STATE OF MICHIGAN

COURT OF APPEALS

DOMINIQUE FORTUNE, by and through her Next Friend, PHYLLIS D. FORTUNE,

Plaintiff-Appellant,

v

CITY OF DETROIT PUBLIC SCHOOLS, CITY OF DETROIT BOARD OF EDUCATION, a municipal corporation, SAMMIE HARRIS, TOMMY FLOWERS, and ROSALYN COLLINS,

Defendants-Appellees,

and

EVELYN MCDUFFIE,

Defendant.

UNPUBLISHED
October 12, 2004

No. 248306
Wayne Circuit Court
LC No. 00-001495-NO

Before: Kelly, P.J., Gage and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting defendants' motions for summary disposition. We affirm.

I. Basic Facts.

This action stems from the alleged rape of plaintiff's seventh-grade daughter, Dominique, by two of her peers, Alonzo Seals and Kevin Thomas. Dominique, Seals and Thomas attended an after-school activity that was supervised by a teacher at the school, defendant Rosalyn Collins. A school policy requires that students attending after-school activities be supervised until leaving the building. Following the after-school activity, Collins watched Dominique, Seals and Thomas walk toward the exit, but she did not see them leave the building. Plaintiff alleges this failure allowed Seals and Thomas to force Dominique into an empty classroom where they raped her. Plaintiff maintains that the above occurred, notwithstanding that defendants had been informed that Seals and Thomas had previously threatened Dominique and other students with bodily harm and sexual assault.

A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is sufficient factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Rose*, *supra*. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Also, the applicability of governmental immunity is a question of law which is also reviewed de novo on appeal. *Carr v City of Lansing*, 259 Mich App 376, 379; 674 NW2d 168 (2003).

B. Analysis

1. 42 USC 1983

Plaintiff claims a deprivation of civil rights and seeks redress pursuant to 42 USC 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

In general,

> [t]o establish a § 1983 claim, the facts, viewed in the light most favorable to the plaintiff, must show that a constitutional violation occurred. If a violation is found, the court must then determine "whether the violation involved 'clearly established constitutional rights of which a reasonable person would have known.'" If no constitutional violation occurred, the defendant has qualified immunity from liability. "Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" [*Dean v Childs*, 268 Mich App 48, 53-54; 684 NW2d 894 (2004) (internal citations omitted).]

a. Substantive Due Process

Plaintiff first claims a violation of her daughter's substantive due process right to bodily integrity. The Due Process Clause of the Fourteenth Amendment has been interpreted to acknowledge a right to "personal security and to bodily integrity," which encompasses the right to be free from sexual abuse. *Doe v Claiborne County, Tenn*, 103 F3d 495, 506 (CA 6, 1996). However, "the Due Process Clause of the Fourteenth Amendment is 'phrased as a limitation on

the State's power to act, not as a guarantee of certain minimal levels of safety and security.'" *Ewolski v City of Brunswick*, 287 F3d 492, 509 (CA 6, 2002), quoting *DeShaney v Winnebago County Dep't of Social Servs,* 489 US 189, 195; 109 S Ct 998; 103 L Ed 2d (1989). Accordingly, "the Due Process Clause does not impose liability on the state for injuries inflicted by private acts of violence." *Ewolski, supra*. There are two recognized exceptions to the this rule. "First, when the government places a person in custody, thereby preventing him from protecting himself, a special relationship is created." *Dean, supra* at 54, citing *Deshaney, supra* at 198-200. Plaintiff concedes there is no "special relationship" in this case. "Second, the government has a duty to protect under the 'state-created danger theory' when the government either created the danger or took actions rendering the person more vulnerable to the danger." *Id*. citing *Deshaney, supra* at 201. Plaintiff's claim is based on this "state-created danger" theory. To establish a claim under the state-created danger theory, a plaintiff must show

> 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Dean, supra*, at 55, quoting *Cartwright v City of Marine City,* 336 F3d 487, 493 (CA 6, 2003), citing *Kallstrom v City of Columbus*, 136 F3d 1055, 1066 (CA 6, 1998), rem 165 F Supp 2d 686 (SD Ohio, 2001).]

Here, plaintiff has failed to show an affirmative act. Plaintiff argues that Collins releasing of Dominique into a vacant school, in violation of a school policy requiring children be supervised until leaving the school, is an affirmative act. However, a "failure to act is not an affirmative act under the state-created danger theory." *Simmons v City of Inkster*, 323 F Supp 2d 812, 817 (ED MI, 2004), quoting *Cartwright, supra* at 493. Because her substantive due process claim is based on Collins' alleged failure to follow a school policy, plaintiff has failed to state a claim that fits under the state-created danger exception. *Sargi v Kent City Bd of Educ*, 70 F3d 907, 912-913 (CA 6, 1995).[1]

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[1] Further, more is required than just a causal connection between the alleged state action and the act of private violence to establish a constitutional violation. Plaintiff must demonstrate that the state acted with the necessary culpability to establish a substantive due process claim under the Fourteenth Amendment. This requires a showing that the alleged wrongful action was so "egregious" that it is "arbitrary in the constitutional sense." *County of Sacramento v Lewis*, 523 US 833, 846; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). Plaintiff must demonstrate that the state "official knows of and disregards an excessive risk to [the victim's] health or safety." *Ewolski, supra,* at 513, citing *Farmer v Brennan*, 511 US 825, 837; 114 S Ct 1970; 128 L Ed 2d 811 (1994). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. Once the inference is made, the official must either act or fail to act in a manner that is consistent with "reckless or callous indifference" to the individual's rights. *Landol-Rivera v Cruz Cosme*, 906 F2d 791, 797 (CA 1, 1990). Plaintiff comes forward with no evidence to support her assertion that defendants possessed this state of mind. Thus, summary disposition was proper.

As plaintiff has failed to show a constitutional violation by school staff, as agents of Detroit Public Schools and/or Detroit Board of Education, she is unable to demonstrate or attribute liability to these governmental entities. A respondeat superior argument, relying solely upon an employer-employee relationship with an alleged tortfeasor, is insufficient to hold a governmental unit liable. *Monell v Dep't of Soc Servs*, 436 US 658, 691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). A plaintiff is required to "identify a government 'policy' or 'custom' that caused the plaintiff's injury," and the governmental unit based on this policy must have been the "'moving force' behind the injury alleged." *Bd of County Comm'rs v Brown*, 520 US 397, 403-404; 117 S Ct 1382; 137 L Ed 2d 626 (1997). The Detroit Public Schools and Detroit Board of Education policy, expressed within the student handbook, against sexual harassment is clearly not the moving force behind the injury in this case. The failure of plaintiff to establish a constitutional violation coupled with the failure to present sufficient evidence to create a genuine issue of material fact regarding whether Detroit Public Schools and Detroit Board of Education had a "custom or usage with the force of law" for creation of an atmosphere that facilitated a violation of her daughter's constitutional right, supports the trial court's grant of summary disposition in favor of defendants.

b. Procedural Due Process

Plaintiff also argues that the trial court erred when it failed to determine defendants violated her daughter's procedural due process rights in conducting an administrative transfer.

The constitutional guarantee of procedural due process limits governmental action and requires the government to institute safeguards in proceedings which affect the rights protected by due process, including life, liberty and property. Students who face suspension from school possess property rights under the due process clause of the Fourteenth Amendment. *See Goss v Lopez*, 419 US 565, 573-575; 95 S Ct 729, 42 L Ed 2d 725 (1975). However, students do not have "procedural due process rights to notice and an opportunity to be heard when the sanction imposed is attendance at an alternative school absent some showing that the education received at the alternative school is significantly different from or inferior to that received at his regular public school." *Buchanan v City of Bolivar*, 99 F3d 1352, 1359 (CA 6, 1996). See *Nevares v San Marcos Consolidated Independent School District*, 111 F3d 25, 26 (CA 5, 1997); *CB v Driscoll*, 82 F3d 383, 389 n 5 (CA 11, 1996); *Doe v Bagan*, 41 F3d 571, 576 (CA 10, 1994); *Zamora v Pomeroy*, 639 F2d 662, 669-70 (CA 10, 1981). Here, plaintiff has not presented any evidence that that the education received at the alternative school is "significantly different from" or "inferior to" that received at the transferring school. Therefore, plaintiff's procedural due process claim is without merit.[2]

2. Title IX

[2] Moreover, an "informal give-and-take between student and disciplinarian" is often sufficient to satisfy procedural due process requirements. *Goss, supra*, at 582-584. Here, plaintiff admitted that her daughter violated the student code of conduct, and therefore, there was no further useful purpose served for continuing the investigation or in providing a further opportunity to be heard prior to administrative transfer.

Plaintiff next argues that the trial court erred when it determined her daughter had not been deprived of educational opportunities and benefits in violation of Title IX. Title IX provides, in relevant part, that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. [20 USC §1681(a).]

In *Davis v Monroe County Bd of Ed*, 526 US 629; 119 S Ct 1661; 143 L Ed 2d 839 (1999), the United States Supreme Court recognized that:

> A private damages action may lie against the school board in cases of student-on-student harassment . . . but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, . . . such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit. [*Davis, supra* at 632.]

Here, plaintiff has not established a Title IX claim. Dominique never complained of sexual harassment before the incident. Plaintiff suggests that school officials had knowledge of sexual harassment because (1) a student indicated that she Collins overheard Seals make abusive comments to Dominique, and (2) one student informed the school counselor, defendant Tommie Flowers, that Seals had sexually harassed her. However, the student admitted that Collins did not condone Seals' comments and would tell Seals not to make the comments. Collins' response to this alleged harassment was not clearly unreasonable. *Davis, supra*, at 649. Further, the student that complained to Flowers that Seals had sexually harassed her did not indicate that she had told Flowers that Seals harassed other girls. Indeed, her relationship with Seals appears distinct from other girls given her testimony that she and Seals had both been suspended, on separate occasions, for fighting with one another.

Moreover, after the sexual assault was reported, Seals and Thomas were expelled within two days. Defendants' response to this incident was not clearly unreasonable. *Davis, supra*, at 649. Therefore, plaintiff has not established a private claim for damages under Title IX.

3. Immunity

Plaintiff asserts for her final issue on appeal that the trial court erred when it granted governmental immunity to the named individual defendants. Governmental employees are entitled to immunity from liability for injuries they cause during the course of their employment if they are acting within the scope of their authority, are engaged in the discharge of a governmental function, and if their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(a), (b), and (c). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Given the absence of notice regarding the threat posed, plaintiff's allegations, at most, amount to negligence in failing to precisely follow school procedures. Evidence of ordinary negligence does not create a question of fact regarding gross

negligence sufficient to survive summary disposition. *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

Moreover, plaintiff cannot demonstrate that the alleged negligence of staff was the proximate cause of injury. To survive summary disposition, based on MCL 691.1407(2)(c), reasonable minds must be able to determine that the behavior of a governmental employee amounted to gross negligence that was the proximate cause of the injury of damage. MCL 691.1407(2)(c). Under this statute, "the proximate cause" is "the one most immediate, efficient, and direct cause of the injury or damage." *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000). Our Supreme Court has determined that MCL 691.1407(2)(c), as applied to governmental employees, "contemplates one cause," which is described as "the immediate, efficient, direct cause preceding the injury." *Robinson*, *supra*, at 462-463. The immediate, efficient and direct cause of injury were the actions of Seals and Thomas, not the purported failure of school personnel to stop their criminal conduct. The trial court properly granted immunity to the individual defendants.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra